

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAYLENE S.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C22-5558-MLP

ORDER

I. INTRODUCTION

Plaintiff seeks review of the denial of her applications for Supplemental Security Income and Disability Insurance Benefits. Plaintiff contends the administrative law judge (“ALJ”) erred in assessing her headaches and certain medical opinions. (Dkt. # 10 at 1.) As discussed below, the Court REVERSES the Commissioner’s final decision and REMANDS the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

II. BACKGROUND

Plaintiff was born in 1993, has one year of college education, and has worked as a retail cashier, crew driver, in-home caregiver, temporary laborer, and window manufacturer. AR at 58, 296-97. Plaintiff was last gainfully employed in September 2019. *Id.* at 305.

1 In October 2019, Plaintiff applied for benefits, with an amended alleged onset date of
2 April 21, 2019. AR at 55, 263-75. Plaintiff's applications were denied initially and on
3 reconsideration, and Plaintiff requested a hearing. *Id.* at 171-86, 189-204. After the ALJ
4 conducted a hearing in April 2021 (*id.* at 44-84), the ALJ issued a decision finding Plaintiff not
5 disabled. *Id.* at 25-38.

6 As the Appeals Council denied Plaintiff's request for review, the ALJ's decision is the
7 Commissioner's final decision. AR at 1-6. Plaintiff appealed the final decision of the
8 Commissioner to this Court. (Dkt. # 4.)

9 III. LEGAL STANDARDS

10 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social
11 security benefits when the ALJ's findings are based on legal error or not supported by substantial
12 evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a
13 general principle, an ALJ's error may be deemed harmless where it is "inconsequential to the
14 ultimate nondisability determination." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
15 (cited sources omitted). The Court looks to "the record as a whole to determine whether the error
16 alters the outcome of the case." *Id.*

17 "Substantial evidence" is more than a scintilla, less than a preponderance, and is such
18 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
19 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
20 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical
21 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d
22 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may
23 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v.*

1 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one
2 rational interpretation, it is the Commissioner’s conclusion that must be upheld. *Id.*

3 **IV. DISCUSSION**

4 **A. The ALJ Should Reconsider Plaintiff’s Headaches on Remand**

5 At step two, a claimant must make a threshold showing that her medically determinable
6 impairments significantly limit her ability to perform basic work activities. *See Bowen v.*
7 *Yuckert*, 482 U.S. 137, 145 (1987); 20 C.F.R. §§ 404.1520(c), 416.920(c). In this case, the ALJ
8 found that Plaintiff’s severe impairments were obesity, depressive disorder, and post-traumatic
9 stress disorder. AR at 28. Plaintiff notes that her migraine headaches were documented
10 throughout the record, and argues that the ALJ erred in failing to (1) include this condition as a
11 severe impairment at step two, or (2) account for the resulting limitations in the residual
12 functional capacity (“RFC”) assessment. (Dkt. # 10 at 3-8.) The Commissioner acknowledges
13 that Plaintiff’s migraines were treated throughout the adjudicated period, but argues that the
14 evidence does not establish that this condition caused any limitations that were not already
15 included in the ALJ’s RFC assessment, and thus any step-two error is harmless. (Dkt. # 11 at 3-
16 4.)

17 Plaintiff disagrees, contending that the record shows that her headaches caused her to
18 have deficits in concentration, persistence, and pace, as well as absenteeism, because she
19 reported experiencing migraines once or twice per week, and testified that once a month her
20 migraines are so severe as to cause seizure-like episodes. *See* AR at 62-65. The ALJ emphasized
21 that Plaintiff’s seizure condition was not diagnosed via objective findings, but did not directly
22 address whether Plaintiff’s headaches were medically determinable and/or severe, or whether
23 Plaintiff’s alleged headache-related allegations were credible. *Id.* at 31-32.

1 The ALJ erred in failing to provide any evaluation of Plaintiff's headache-related
2 functional allegations, even if the ALJ's failure to reference Plaintiff's headaches at step two
3 could be considered harmless. *Cf. Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007) (finding a
4 step-two error harmless because the ALJ considered the limitations caused by the omitted
5 impairment when assessing the plaintiff's RFC). Accordingly, on remand, the ALJ should
6 reconsider the evidence related to Plaintiff's headaches at step two and at any subsequent steps in
7 the decision.

8 **B. The ALJ Erred in Assessing Medical Opinion Evidence**

9 Plaintiff alleges that the ALJ erred in (1) finding the opinions of two psychologists
10 unpersuasive, and (2) assessing the State agency opinions. Plaintiff also argues that the ALJ's
11 errors in assessing Plaintiff's migraines tainted her assessment of another psychologist's opinion.
12 The Court will address each disputed opinion in turn.

13 *1. Legal Standards*

14 Under regulations applicable to this case, the ALJ is required to articulate the
15 persuasiveness of each medical opinion, specifically with respect to whether the opinions are
16 supported and consistent with the record. 20 C.F.R. §§ 404.1520c(a)-(c), 416.920c(a)-(c). An
17 ALJ's consistency and supportability findings must be supported by substantial evidence. *See*
18 *Woods v. Kijakazi*, 32 F.4th 785, 792 (9th Cir. 2022).

19 *2. Kimberly Wheeler, Ph.D., and Dana Harmon, Ph.D.*

20 Dr. Wheeler examined Plaintiff in October 2019 and completed a DSHS form opinion
21 describing many marked functional limitations. AR at 762-66. Dr. Harmon reviewed Dr.
22 Wheeler's opinion as well as one treatment note and completed another DSHS form opinion
23 describing the same functional limitations identified by Dr. Wheeler. *Id.* at 754-58. The ALJ

1 found that the opinions of Drs. Wheeler and Harmon were inconsistent with the record because
2 the opinions described disabling limitations, but the record demonstrated that Plaintiff was not
3 significantly limited in her “everyday functioning[,]” “tending to her own cares[,]” completing
4 “typical household chores” and “running errands[.]” *Id.* at 36.

5 Plaintiff disagrees with the ALJ’s reasoning, suggesting that the record corroborated
6 limitations in her ability to complete her daily activities. (Dkt. # 10 at 12-13.) As evidence to
7 support this argument, Plaintiff cites her own statements as documented in her function reports.
8 (*Id.* (citing AR at 317-23, 333).) Plaintiff also testified at the hearing regarding her limited
9 activities (AR at 66-76), and other evidence in the record corroborates Plaintiff’s testimony as
10 well.¹

11 Moreover, even if (as found by the ALJ) Plaintiff did retain the ability to complete her
12 self-care, perform household chores, and run errands, such an ability would not necessarily be
13 inconsistent with most of the disabling limitations identified by Drs. Wheeler and Harmon. *See*,
14 *e.g.*, AR at 757, 764 (finding Plaintiff markedly limited in her ability to follow detailed
15 instructions, comply with a schedule, and complete a normal workday/workweek). There is no
16 evidence in the record to suggest that Plaintiff’s daily activities involved following detailed
17 instructions or complying with a schedule, or that she performed her activities in a manner
18 analogous to a normal workday/workweek. Notably, Drs. Wheeler and Harmon found Plaintiff to
19 be not limited or only mildly limited in the areas that most directly relate to daily activities. *See*,
20 *e.g.*, *id.* (finding Plaintiff less than markedly limited as to performing routine tasks, making

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22 ¹ *See, e.g.*, AR at 667 (Plaintiff describes physical limitations impacting her ability to complete daily
23 activities), 837 (documenting Plaintiff’s daily PTSD triggers causing intrusive memories), 839 (Plaintiff
reports feeling like she wants to stay in bed all day), 847 (Plaintiff reports feeling so anxious she “can’t
move”), 849 (Plaintiff reports feeling “frozen”, like she is “not able to get up and do anything”), 873
(Plaintiff reports not eating, sleeping, or showering), 879 (Plaintiff’s therapy goals include reducing
“distressing symptoms related to trauma and sadness, in order to improve daily functioning”).

1 simple decisions, being aware of normal hazards, and asking simple questions). Thus, the Court
2 finds that the ALJ's conclusion that the opinions of Drs. Wheeler and Harmon are inconsistent
3 with the record is not supported by substantial evidence, and is therefore erroneous.

4 3. *State Agency Opinions*

5 Plaintiff argues that the ALJ erred in giving "the greatest weight" to the State agency
6 opinions (AR at 87-124, 127-66) because those opinions were not informed by a review of the
7 entire record, and because the ALJ did not fully account for the opinions that she purported to
8 credit. (Dkt. # 10 at 15-17.)

9 At the outset, the Court notes that because the 2017 regulations apply to this decision, the
10 ALJ did not assign any weight to any of the opinions, and thus did not give "the greatest weight"
11 to the State agency opinions. The Court also notes that due to a presumed scrivener's error, the
12 ALJ did not find the State agency opinions either persuasive or unpersuasive. *See* AR at 35. The
13 context of the ALJ's decision suggests that she found the opinions to be at least somewhat
14 persuasive, but the sentence wherein such a finding would be is incomplete, missing the word
15 "persuasive" or any variant thereof.² *Id.*

16 But the ALJ did go on to find that the State agency reconsideration opinion was
17 inconsistent with the record to the extent that it described Plaintiff with moderate social deficits,
18 and thus suggested that she found this opinion less persuasive. AR at 35 (referencing *id.* at 141).
19 Plaintiff challenges the ALJ's failure to address a different part of the reconsideration opinion,
20 however: the ALJ did not acknowledge that the reconsideration opinion states that "[o]ccasional
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22 ² On remand, the ALJ should revise the assessment of the State agency opinions to use complete
23 sentences, using some form of the word "persuasive." *See* 20 C.F.R. §§ 404.1520c(a)-(c), 416.920c(a)-(c)
(requiring an evaluation of the persuasiveness of medical opinions). The Court finds no other error in the
ALJ's assessment of the State agency opinions, as explained herein, but on remand the ALJ may
reconsider these opinions as appropriate in light of the updated record.

1 supervisor instruction/redirection will help keep [Plaintiff] on task.” *Id.* at 141. The Court finds
2 that when the opinion is read as a whole, however, it is reasonable to interpret this portion of the
3 opinion as failing to state an RFC limitation, because the next sentence reads: “Nonetheless
4 [Plaintiff] is capable of concentrating throughout a competitive 40 hour workweek.” *Id.* at 141.
5 The consultant’s use of the word “nonetheless” indicates that the consultant found Plaintiff
6 capable of maintaining concentration on a full-time basis even without additional
7 instruction/redirection from a supervisor, contrary to Plaintiff’s alternate interpretation of the
8 opinion. (*See* dkt. # 12 at 6 (interpreting the reconsideration opinion to mean that “[w]ithout
9 redirection” from a supervisor, Plaintiff would be off-task an impermissible portion of the day).)
10 Because the consultant found Plaintiff capable of maintaining sufficient concentration to
11 complete a full-time work schedule, the concerns regarding additional instruction/redirection do
12 not describe the most Plaintiff can still do, and therefore do not pertain to the ALJ’s assessment
13 of Plaintiff’s RFC. *See* 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1) (RFC “is the most you can
14 still do despite your limitations.”). Accordingly, Plaintiff has not shown that the ALJ’s RFC
15 assessment erroneously fails to account for the State agency opinions.

16 4. *Reginald Adkisson, Ph.D.*

17 Dr. Adkisson performed a consultative psychological examination of Plaintiff in
18 February 2020 and found *inter alia* that Plaintiff had marked concentration and persistence
19 limitations due to her physical problems. *See* AR at 664-69. The ALJ found this portion of Dr.
20 Adkisson’s opinion to be inconsistent with her interpretation of the medical evidence related to
21 Plaintiff’s physical conditions. *Id.* at 35.
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1 Because, as found *supra*, the ALJ should reconsider the evidence related to Plaintiff's
2 migraines on remand, the ALJ should also reconsider Dr. Adkisson's opinion in light of the
3 review of the updated record on remand.

4 **V. CONCLUSION**

5 For the foregoing reasons, the Commissioner's final decision is **REVERSED**, and this
6 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C.
7 § 405(g). On remand, the ALJ should reconsider the opinions of Drs. Wheeler and Harmon, and
8 reconsider the evidence related to Plaintiff's migraines at step two, in assessing Plaintiff's RFC
9 and in assessing Dr. Adkisson's opinion. The ALJ should take care to revise the written
10 assessment of the State agency opinions as instructed herein. The ALJ may also reconsider any
11 other part of the decision as necessary in light of the updated record on remand.

12 Dated this 12th day of January, 2023.

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14 MICHELLE L. PETERSON
15 United States Magistrate Judge
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